Supreme Court, U.S.
FILED
MAY 20 2002
OFFICE OF THE CLERK

No. 01-1449

IN THE

Supreme Court of the United States

PAUL LEROY ERVIN,

Petitioner,

v.

STATE OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA, HARRISBURG

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Procedural History

Petitioner was arrested on July 5, 1995 and charged with two counts of Rape,[1] two counts of Sexual Assault,[2] four counts of Involuntary Deviate Sexual Intercourse,[3] two counts of Aggravated Indecent Assault,[4] six counts of Indecent Assault,[5] two counts of Endangering the Welfare of Children,[6] two counts of Corruption of Minors,[7] and one count of Incest,[8] Indecent Exposure,[9] and Statutory Sexual Assault.[10] The victims in this case are Petitioner's two natural daughters, ages ten (10) and eleven (11).

The case was tried before a jury, with the Honorable Cynthia M. Rufe of the Bucks County Court of Common Pleas presiding. At trial, Michael Goodwin, Esquire represented Petitioner. The trial commenced on December 11, 1995,

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1. 18 Pa. Cons. Stat. Ann. §§ 3121(a)(1), (2)

2. 18 Pa. Cons. Stat. Ann. § 3124.1

3. 18 Pa. Cons. Stat. Ann. §§ 3123(a)(1), (2), (6), (7)

4. 18 Pa. Cons. Stat. Ann. §§ 3125(7), (8)

5. 18 Pa. Cons. Stat. Ann. §§ 3126(a)(2), (7), (8)

6. 18 Pa. Cons. Stat. Ann. § 4304(a)

7. 18 Pa. Cons. Stat. Ann. § 6301(a)(1)

8. 18 Pa. Cons. Stat. Ann. § 4302

9. 18 Pa. Cons. Stat. Ann. § 3127(a)

10. 18 Pa. Cons. Stat. Ann. § 3122.1

and Petitioner was convicted of all charges on December 13, 1995. During post-trial matters, John Brendan Elbert, Esquire, represented Petitioner. A sentencing hearing was held on March 4, 1996, where Judge Rufe sentenced Petitioner to not less than seven and one-half (7 ½) nor more than fifteen (15) years to be served at a state correctional facility. On June 7, 1996, a hearing was held on allegations of ineffective assistance of counsel. Petitioner then filed a brief in Superior Court. The Superior Court affirmed the judgment of the lower court and determined that all issues raised by Petitioner were without merit. The Supreme Court denied a petition for allocatur.

Petitioner then retained the services of S. Lee Ruslander II, Esquire. Petitioner filed a Post-Conviction Relief Act (PCRA) petition, and an evidentiary hearing was conducted on March 19, 1999. On August 31, 1999, the Honorable Cynthia M. Rufe, denied and dismissed Petitioner's PCRA petition. Petitioner appealed that decision, and on November 1, 2000, the Superior Court affirmed the order of the PCRA court. Petitioner then filed an application for reargument, and on December 29, 2000, the Superior Court again affirmed the order of the PCRA court. Petitioner filed a second application for reargument, and the Superior Court once again affirmed the order of the PCRA court. Petitioner filed a petition for allocatur, which the Pennsylvania Supreme Court denied. This Petition for Writ of Certiorari followed.

B. Factual History

The victims in this case, M.T. and A.T., are Petitioner's daughters. At the time of the events in this case, M.T. was eleven (11) years of age, and A.T. was ten (10) years of age. Both M.T. and A.T. resided with their mother, Rebecca McCardell, in Chambersburg, Pennsylvania. In 1995, the year in which Petitioner committed these crimes, Ms. McCardell

and Petitioner had a visitation agreement that had been in existence for several years. Petitioner had remarried, however, and his visitation with his two daughters had steadily decreased over a period of four years. (N.T. 12/12/95, pp. 140-141). At the time of these events, the victims were visiting Petitioner at his residence in Bucks County. (N.T. 12/12/95, p. 142). The agreement was for the children to remain with Petitioner for a two-week period, which included the last week of June 1995 and the first week of July 1995. (N.T. 12/12/95, p. 142). This was the first time that the children had visited Petitioner that year.

The first incident occurred with Petitioner's ten-year-old daughter, M.T. On July 1, 1995, just before dinnertime, M.T. entered the computer room in Petitioner's residence to play with the puppies. (N.T. 12/12/95, p. 30). M.T. also wanted to play with the computer. Petitioner was using the computer at the time and agreed to let M.T. use it. M.T. then sat on Petitioner's lap to play on the computer. (N.T. 12/12/95, p. 32). M.T. and Petitioner were alone in the computer room, and Petitioner's wife, Holly, had not yet returned from work. The other children then entered the computer room and began playing on the computer. Petitioner asked M.T. to go downstairs to the basement with him. (N.T. 12/12/95, p. 32). M.T. knew that Petitioner had been drinking alcoholic beverages that day. (N.T. 12/12/95, p. 33).

M.T. went to the bathroom and then went downstairs. Shortly thereafter, Petitioner followed her to the basement. He went over to M.T., lifted her up, and placed her in a standing position on a chair. (N.T. 12/12/95, pp. 35-36). Petitioner pulled down M.T.'s pants and began to touch her vagina with his finger. The touching continued for a few minutes. (N.T. 12/12/95, pp. 37-40). Petitioner stopped when he realized his wife had returned from work. He told M.T. not to tell anyone or she would get smacked with a wooden paddle. (N.T. 12/12/95, p. 42).

The second and third incidents occurred with Petitioner's daughter A.T., who was ten (10) years of age at the time of these events. On July 1, 1995, shortly after the incident with M.T., A.T. was in the computer room playing on the computer. Petitioner entered the computer room and ordered her to move. (N.T. 12/12/95, p. 70). Petitioner sat down at the computer, and A.T. then sat on his lap. A.T. was wearing shorts and a top. Petitioner proceeded to stick his finger in A.T.'s vagina. (N.T. 12/12/95, pp. 70-71). Petitioner moved his fingers around inside the crack of A.T.'s vagina. As Petitioner did this, he would remove his fingers and lick them. He would then put his fingers back into A.T.'s vagina. (N.T. 12/12/95, p. 73). Petitioner was alone with A.T. in the computer room as this happened. A.T. began to cry in the computer room as Petitioner was touching her and licking his fingers. Petitioner covered A.T.'s mouth and told her to be quiet. (N.T. 12/12/95, p. 74). A.T. specifically recalled that Petitioner was drinking bottled beer that night. (N.T. 12/12/95, p. 77).

The third incident occurred later that same day, before dinner. Petitioner took A.T. for a walk to the pond located near his residence. Petitioner's other daughter, M.T., from his present marriage, asked to go along, but Petitioner refused to let her. (N.T. 12/12/95, p. 76). Petitioner took A.T. to a wooded area surrounding the pond. At that point, Petitioner removed A.T.'s pants and underwear and lowered his own pants and underwear to his ankles. (N.T. 12/12/95, p. 83).

While A.T. was lying down on the ground with her pants and underwear removed, Petitioner penetrated her vagina with his penis. He was on his hands and knees while doing this (N.T. 12/12/95, p. 84). Petitioner also put his penis in A.T.'s anus. He muffled A.T.'s cries by placing his hands over A.T.'s mouth, and told her to be quiet. (N.T. 12/12/95, pp. 87-89). A.T., like M.T., was told not to tell what had happened or she would be spanked with a wooden paddle, and would also never see her mother again. (N.T. 12/12/95, p. 89).

Later that day, when Petitioner and A.T. returned from the pond, M.T. noticed that A.T.'s eyes were bloodshot red. (N.T. 12/12/95, p. 46). M.T. asked A.T. what was wrong in front of Petitioner. A.T. responded that they had gotten lost. Later that night, as the two were preparing for bed, M.T. asked A.T., "What really happened?" (N.T. 12/12/95, pp. 46-47). A.T. told her that, "Dad took her down halfway around the pond . . . and that he told her to pull down her pants . . . and he told her to do it or else she would never see mom again." (N.T. 12/12/95, p. 47). When Petitioner left the house, M.T. called her mother and told her what had happened to her sister and herself. (N.T. 12/12/95, pp. 48-49). Ms. McCardell immediately made phone calls to the State Police and Children and Youth Services. She traveled to Bucks County and with the help of the police, retrieved her children from Petitioner's residence. (N.T. 12/12/95, p. 147). In the early hours of July 2, 1995, New Britain Township Police removed the children from Petitioner's home and returned them to Ms. McCardell. (N.T. 12/12/95, pp. 160, 162).

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS SHOWN NO GROUNDS FOR WHICH THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER.

United States Supreme Court Rule 10 sets forth the considerations governing the Review on Certiorari as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reason the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question in a way that conflicts with relevant decisions of this Court.
>
> A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

United States Supreme Court Rule 10.

This is not a case where Petitioner is appealing an order of a United States court of appeals that entered a decision in conflict with the decision of another United States court of appeals on the same important matter. This is not a case where a United States court of appeals decided an important federal question in a way that conflicts with a decision by the Pennsylvania Supreme Court. This is also not a case where a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, so as to necessitate this Court's supervision. Further, this is not a case where the Pennsylvania Supreme Court or Pennsylvania Superior Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. This is not a case where a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Finally, this is not a case where a state court or a United States court of appeals has decided an important question in a way that conflicts with relevant decisions of this Court. Moreover, there is no compelling reason for this Court to grant this Petition for Writ of Certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

II.

THE PENNSYLVANIA SUPERIOR COURT PROPERLY INTERPRETED THE STATE OF PERTINENT PENNSYLVANIA LAW, WHICH IS IN ACCORD WITH FEDERAL LAW, REGARDING THE ADMISSION OF PRE-ARREST SILENCE AGAINST A NONTESTIFYING DEFENDANT.

Petitioner was not in custody and not being questioned when he said nothing while the police removed his children from the residence. Under Pennsylvania law, a criminal defendant's silence will be deemed inadmissible if the defendant is in custody or if the police have initiated a custodial interrogation. *Commonwealth v. Gwynn*, 723 A.2d 143, 150 (Pa. 1998); *see Commonwealth v. Drass*, 718 A.2d 816, 819 (Pa. Super. 1998). This rule, however, does not apply to pre-arrest situations.

The Pennsylvania Superior Court stated in *Commonwealth v. Kitchen*, 730 A.2d 513, 524 (Pa. Super. 1999) that:

> a criminal defendant's right against self-incrimination is violated . . . when the comments or questions, followed by a lack of response from an accused, flow from a law enforcement officer during an interrogation of an accused. If an individual makes an accusatory statement to a person and that person fails to challenge or contradict the statement, evidence of the failure to respond may be admitted at trial. Our Court stated in *Commonwealth v. O'Kicki*, (citation omitted) 597 A.2d 152 (Pa. Super. 1991), the rule of evidence is well established that, when a statement made in the presence and hearing of a person if incriminating in character and naturally calls for denial but is not challenged or contradicted by the accused although he has the opportunity to

> speak, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the charges thus made. The justification of this rule is to be sought in the age-long experience of mankind that ordinarily an innocent person will spontaneously repel false accusations against him, and that a failure to do so is therefore some indication of guilt.

The prosecution introduced during the direct examination of Police Officers Golembeski and Burkhardt that Petitioner made no comment on July 2, 1995 when police arrived and informed him of their plan to remove the children from his home. Additionally, the prosecution made argument regarding Petitioner's lack of reaction during closing. The introduction of this evidence and subsequent argument thereof reveals that such evidence was non-testimonial. The prosecution presented no evidence that the police officers questioned Petitioner on the night of July 2, 1995. In addition, the prosecution presented no evidence that an investigation surrounding Petitioner's conduct had commenced at the time the police arrived at Petitioner's house to remove the children. Rather, the police officers testified that they arrived at Petitioner's home for the sole purpose of removing the children.

It is clear that Petitioner was not in police custody in the early morning hours of July 2, 1995. Petitioner's wife let the police into the home. The officers' only purpose in being in the home was to ensure the safety of the children in leaving the premises. While in the home, one officer stated several times that his sole intent was to protect the safety and welfare of the children. (N.T. 12/12/95, pp. 163-165). The police officers entered Petitioner's bedroom and told Petitioner to "proceed downstairs and wait with Officer Burkhardt." (N.T. 12/12/95, p. 205). Officer Golembeski's presence in the bedroom was to "make sure [Ervin] was not going to arm himself or jump out a window." (N.T. 12/12/95 p. 204).

Petitioner was never handcuffed. The police never suggested to Petitioner that he was not free to go about his business. The officers made no request of Petitioner to exit the home. The officers made no request of Petitioner to answer questions. The police never warned Petitioner that he would be placed under arrest. The Police did not place Petitioner under arrest either before or after Petitioner went downstairs. The police only requested Petitioner proceed downstairs for the safety of Petitioner and themselves. The officers then removed the children from the premises and explained their basis for doing so. (N.T. 12/12/95, p. 163). Under the totality of the circumstances, Petitioner was not in custody and the conduct the officers observed occurred before Petitioner's arrest.

There was no police interrogation. Petitioner fails to cite any specific questions or conduct by the police officers that would have been likely to evoke an admission. Petitioner was merely asked to go downstairs and remain with an officer. Petitioner was not asked questions once he went downstairs. As the PCRA court noted, under *Commonwealth v. Turner*, 454 A.2d 537 (Pa. 1982), had Petitioner been in custody, police questioning may have been different, Petitioner's Fifth Amendment rights would have been at risk, and analysis of this issue might have been different. (Trial Court Opinion, 12/30/99, p. 7 n.6).

In conclusion, Petitioner was not subject to custodial interrogation. Petitioner was not taken into police custody until days after the removal of the children. Therefore, any comment on his behavior that evening was non-testimonial. Such evidence, under *Kitchen*, is admissible in the prosecution's case-in-chief and closing argument. Should the evidence and argument be deemed testimonial, Petitioner still fails to show his Fifth Amendment rights were violated under Pennsylvania law.

The Pennsylvania Supreme Court has ruled that, "absent a pronouncement by the United States Supreme Court, decisions of the inferior federal courts are not binding upon Pennsylvania courts." *Weaver v. Pennsylvania Bd. of Probation and Parole*, 688 A.2d 766, 772 (Pa. 1997), citing *Lindner v. Mollan*, 677 A.2d 1194 n.1 (Pa. 1996). Even where a federal question is involved, the state court is not required to follow a federal court and can determine whether or not the federal court decision is persuasive. *Id.*, citing *Breckline v. Metropolitan Life Ins. Co.*, 178 A.2d 748, 751 (Pa. 1962).

Nonetheless, several courts of appeals have addressed the extent of the Fifth Amendment privilege relating to pre-arrest silence, some on which Petitioner relies. Courts of appeals decisions, however, are not binding on Pennsylvania state courts. Moreover, the cases on which Petitioner relies are not persuasive authority for purposes of this case because they involve factual scenarios that are distinguishable from the case at bar. For example, Petitioner urges the reasoning set forth in *Ouska v. Cahill-Masching*, 246 F.3d 1036 (7th Cir. 2001) and *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000). In *Ouska*, the prosecution elicited testimony from a detective during its case-in-chief. The testimony indicated that the defendant remained silent in response to the detective asking her questions regarding a murder investigation. There, the court decided that the defendant's Fifth Amendment rights were violated. *Id.* at 1049.

The court in *Combs v. Coyle*, 205 F.3d 269, 283, 286 (6th Cir. 2000), held similarly, but specified that the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime. The court's holding focused on the fact that the defendant, upon questioning by police, "invoked his privilege against self-incrimination by telling the officer to talk to his lawyer, thus conveying his desire to remain silent." *Id.*

The instant case is distinguishable from *Ouska* and *Combs*. In each of those cases, the defendant's silence was in response to police questioning, asked as part of an investigation. Additionally, in *Combs*, the defendant had invoked his right to remain silent after police questioned him for investigation purposes. Here, the silence on which the prosecution commented was Petitioner's inaction to officers removing his children from the home. At no time did officers question Petitioner regarding the rapes. Also, Petitioner never expressed a desire to remain silent. In fact, the investigation had not yet begun. Therefore, the cases Petitioner relies on are not persuasive in this case.

Petitioner erroneously cites to *Griffin v. California*, 380 U.S. 609, 615 (1965) to advance his contention that the Fifth Amendment protects pre-arrest silence. That case did not deal with the issue of pre-arrest silence, but rather the right to remain silent during trial. In *Griffin*, this Court found that the trial court erred for instructing the jury on the issue of guilt by explaining that a defendant's failure during trial to explain or deny evidence introduced by the prosecution may indicate the truth of such evidence. Thus, the quote Petitioner refers to, namely that the Fifth Amendment forbids comment by the prosecution with regard to defendant's silence, was specific to the defendant's right to remain silent during trial by exercising his right not to testify. To illustrate Petitioner's misuse of *Griffin*, the court in *United States v. Thompson*, 82 F.3d 849, 856 (9th Cir. 1996) opined that, "*Griffin* does not necessarily apply in a pre-arrest, non-coercive situation." Thus, *Griffin* is not controlling in the case at bar.

The cases in which the courts of appeals have ruled that the Fifth Amendment protects such silence were based on the fact that the defendant was questioned by authorities and invoked the right to remain silent and speak to an attorney. Such was not the case here, thus there was no Fifth

Amendment violation. The factual circumstances surrounding Petitioner's case are more closely aligned with the courts of appeals that have held a defendant's pre-arrest, pre-Miranda silence is admissible in the prosecution's case-in-chief. Several recent courts of appeals have held that the Fifth Amendment is not violated when the government comments on a defendant's silence prior to his arrest. *See United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590 (5th Cir. 1996); and *United States v. Oplinger*, 150 F.3d 1061 (9th Cir. 1998).

For instance, in *Rivera*, the court held that "the government may comment on a defendant's silence if it occurred prior to the time he is arrested and given Miranda warnings." 944 F.2d at 1568. In *Zanabria*, the court held that the Fifth Amendment protects a defendant against compelled self-incrimination, not a defendant's silence before he is arrested, where the government did not induce the silence at issue. 74 F.3d at 593. Similarly, the court in *Oplinger* held that the "privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." 150 F.3d at 1066-67.

Further, the court in *Oplinger* determined how far the Fifth Amendment extended based on "whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent." *Id.* at 1066, citing *Jenkins v. Anderson*, 447 U.S. 231, 241, 243-44 (1980) (Stevens, J., concurring). "A different view ignores the clear words of the Fifth Amendment." *Id.* Moreover, in *United States v. Giese*, 597 F.2d 1170 (9th Cir. 1979), the court held that "[n]either due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of the silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior." *Id.* at 1197. Finally, the court in *United States v. Gecas*, 120 F.3d 1419, 1456 (11th Cir. 1997), determined that "the self-

incrimination clause was intended as a 'limitation on the investigative techniques of government, not as an individual right against the world.' "

Here, the facts contained in *Rivera, Zanabria*, and *Oplinger* are similar to Petitioner's case, therefore, those cases are persuasive authority concerning whether the Pennsylvania Superior Court ruled correctly. Likewise, the reasoning set forth in those cases and *Jenkins*, *Giese*, and *Gecas* support pertinent Pennsylvania law that makes a distinction between whether a defendant's silence was a product of government inducement or merely inaction by a defendant who is not under arrest, had not been mirandized, and who had not been asked questions by officials. Because Petitioner's case is analogous to facts in those cases, Petitioner's Fifth Amendment rights were not violated.

III.

THE PENNSYLVANIA SUPERIOR COURT APPLIED THE PROPER STANDARD IN DETERMINING COUNSEL WAS NOT INEFFECTIVE.

The Pennsylvania Superior Court employed Pennsylvania's well-settled test for ineffective assistance of counsel. This test entails three prongs. To establish ineffective assistance of counsel, Petitioner must first show that the underlying claim itself has arguable merit. Second, Petitioner must show counsel's choice lacked a reasonable basis designed to effectuate the client's best interests. Third, Petitioner must demonstrate that he was prejudiced by counsel's decision. *Commonwealth v. Pierce*, 527 A.2d 973, 976 (Pa. 1987).

Petitioner argues that the Pennsylvania Superior Court did not properly address his ineffectiveness claim because it did not apply the test established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Pennsylvania's test is

virtually identical to this Court's *Strickland* test. Because state courts share responsibility for the application and enforcement of federal law, state courts may interpret federal law. *City of Chester v. Public Util. Comm'n*, 773 A.2d 1280, 1285 (Pa. 2001). The Pennsylvania Supreme Court in *Pierce* addressed the issue of whether Pennsylvania's standard for ineffective assistance of counsel is similar to that of *Strickland*. The court in *Pierce* held that "identical textual policy considerations logically lead [it] to hold that together they constitute an identical rule of law. . . ." *Pierce*, 527 A.2d at 976-77.

Specifically, *Pierce* identified that "Strickland's major thrust is directed at establishing the rule that ineffective assistance mandates relief only where it has been established by the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 974, citing *Strickland*, 466 U.S. at 694. The *Pierce* court explained that "the commanding intent of *Strickland* is to burden the defendant with the task of proving actual prejudice" using a totality of the circumstances test. *Id.* at 975. The court then explained that *Strickland* "directs the review of the appellate court at the reliability of the verdict rather than at the quality of counsel's performance." *Id.*

The court in *Pierce* went on to say that Pennsylvania's Supreme Court cases "clearly indicate that ineffectiveness claims are measured by two components. First, counsel's performance is evaluated in light of its reasonableness if it is determined that the underlying claim is of arguable merit. Second, the defendant must demonstrate how the ineffectiveness prejudiced him." *Id.* These are the two components of which the *Strickland* test is comprised. Therefore, Petitioner's allegation that the Superior Court, in hearing Petitioner's PCRA petition, should have applied the *Strickland* test, and that its failure to do so conflicts with this Court's jurisprudence has no merit. To the contrary, *Pierce* shows Pennsylvania's test is identical to this Court's standard.

Here, the Pennsylvania Superior Court came to the proper conclusion that Petitioner did not prove that trial counsel had no reasonable basis for failing to object to references of Petitioner's pre-arrest silence during testimony and closing argument. The burden is on Petitioner to show that trial counsel was ineffective. *Commonwealth v. Donahue*, 630 A.2d 1238, 1250 (Pa.Super. 1993). The Superior Court of Pennsylvania has recognized that trial counsel will be presumed effective when analyzing a claim of ineffectiveness. Counsel will be deemed effective if the choices made at trial had a reasonable basis designed to serve the client's interest. The degree of reasonableness is immaterial. The existence of alternatives that may have been more reasonable in hindsight will not satisfy a claim of ineffectiveness. *Commonwealth ex rel. Washington v. Maroney*, 235 A.2d 349, 352-53 (Pa. 1967).

Here, Petitioner fails to plead and prove the first prong of the test. Petitioner's silence did not follow questioning by officers, it did not follow the arrest of Petitioner, and it was not in response to Miranda warnings. Petitioner's conduct was observed by officers upon removing Petitioner's daughters from the residence, prior to the commencement of an investigation, prior to Petitioner's arrest, and prior to Miranda warning being given. Accordingly, evidence of Petitioner's inaction constituted non-testimonial evidence that was admissible. There was no constitutional or evidentiary ground upon which trial counsel should have objected. This evidence was relevant and not an infringement upon Petitioner's Fifth Amendment rights. As such, Petitioner's counsel cannot be held ineffective for failing to object.

Should this Court find there is arguable merit to an ineffective assistance of counsel claim, Petitioner fails to plead and prove the second prong of the test. Under the facts of this case, Petitioner was not under custodial interrogation and was not under arrest on the night police removed his

children. This evidence was non-testimonial in nature and admissible under evidentiary and constitutional grounds. Thus, it cannot be said trial counsel lacked a reasonable basis not to object.

Further, at the PCRA hearing, Petitioner did not question trial counsel concerning why he chose not to object to the prosecutor's questioning and argument; therefore the court had no way of determining whether trial counsel may have had a reasonable basis for not objecting. In support thereof, the Superior Court reasoned that, "the state of the law was [not] clear and the prejudice [was not] obvious," thus, the court could not "conclude that counsel lacked any reasonable basis for failing to object." *Commonwealth v. Ervin*, 766 A.2d 859, 863 (Pa.Super. 2000). Thus, Petitioner failed to plead and prove ineffective assistance of counsel under the second prong of the test.

Should this Court find Petitioner meets the second prong, he still fails to meet his burden under the third prong. Pursuant to the PCRA, an ineffective assistance of counsel claim may warrant relief only where it "so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). Pursuant to *Commonwealth v. Kimball*, 724 A.2d 326 (Pa. 1999), "the prejudice standard applicable to ineffective assistance of counsel claims brought on direct appeal is substantively identical to the prejudice standard for ineffective assistance of counsel claims brought on collateral appeal pursuant to the PCRA." *Id.* at 311. In addition, Petitioner must prove with reasonable probability that the outcome of the trial would have been different. *Id.* at 331.

Petitioner has failed to plead and prove that the outcome of the trial would have been different. The Pennsylvania Superior Court properly concluded:

> We are convinced that in the context of the trial as a whole — the forceful testimony of the two girls, together with the medical expert testimony about the probable causes of the deformation of A.T.'s hymen — that Ervin would have been convicted without this evidence.

Ervin, 766 A.2d at 863. Thus, Petitioner also fails to meet his burden under the third prong.

Nevertheless, even if this Court finds counsel was ineffective, counsel's failure to object was harmless error. A new trial cannot be granted if the error was harmless. *Commonwealth v. Rivera*, 597 A.2d 690, 694 (Pa.Super. 1991). Evidence will be treated as harmless if any one of three grounds is met: (1) the error did not prejudice the defendant or the prejudice was de minimus; (2) the erroneously admitted evidence was cumulative of other, untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted evidence was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. *Commonwealth v. Montgomery*, 687 A.2d 1131, 1138 (Pa. Super. 1996).

First, the error did not prejudice Petitioner and if prejudicial at all, was de minimus. As explained above, Petitioner would not be prejudiced by the error because there was more than sufficient evidence to convince the jury that Petitioner committed the rapes without the evidence regarding his behavior while officers removed his daughters from the home. Next, the prosecution introduced evidence

that was so overwhelming that the prejudicial effect of the error would be insignificant by comparison, such that the omission of counsel's objection could not have contributed to the jury's verdict of guilty.

CONCLUSION

Based on the reasons set forth herein and authorities stated in support thereof, the Commonwealth respectfully requests that this Honorable Court deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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